

ESTATE OF EDITH ANDERSON  
PRETTY BIRD FERRON

IBIA 77-3

Decided March 17, 1977

Appeal from an order denying petition for rehearing.

Affirmed and Dismissed.

1. Indian Probate: Claim Against Estate: Care and Support

A claim for services rendered the decedent has been consistently denied where there is no evidence of any agreement to pay at the time the services were alleged to have been rendered, and no expectation on the part of the claimant that they would be paid for.

APPEARANCES: Richard Bergen, appellant, pro se; Terry Pechota, Esq., South Dakota Legal Services, for appellee, Jennie Cloud.

OPINION BY ADMINISTRATIVE JUDGE SABAGH

This is an appeal from an order of Administrative Law Judge Frederick W. Lambrecht denying petition for rehearing.

The appeal is based upon a claim filed by appellant, Richard Bergen, for services rendered the decedent prior to her death. The appellant asserts that he began rendering these services gratuitously, but that in January 1973 the decedent orally agreed to pay him 10 percent of the cash and value of any property he recovered for her, which in this case he alleges to be approximately \$49,099.49, received by the decedent from the sale of four or five pieces of allotted land. The record discloses that the appellant was paid approximately \$2,303 by the decedent while living for expenses.

It is interesting to note that the decedent had previously entered into a contingency fee arrangement with two attorneys regarding services to be rendered in the matter of the estate of Luther Pretty Bird. The appellant insisted this arrangement was invalid since it had not been approved in writing by the Secretary of the Interior. On cross-examination the appellant argued that his alleged oral agreement with the decedent was perfectly valid without Secretarial approval though the aforementioned written agreement was not.

The appellant refused to itemize the time spent in serving the decedent and now contends he is entitled to the 10 percent under the alleged oral agreement "in keeping with our Indian culture and manner of helping out and/or assisting each other in time of need." This theory of recovery was not propounded at the hearing or in appellant's petition for rehearing.

An effort was made by Judge Lambrecht to have the appellant itemize his time spent in serving the decedent. He refused to submit an itemization, consistently reiterating he was entitled to 10 percent of the amount recovered by the decedent.

A claim for services rendered the decedent has been consistently denied where there was no evidence of any agreement to pay at the time the services were alleged to have been rendered, and no expectation on the part of the claimant that they would be paid for. Estate of White Hawk, R.S. #4143 (12100-36).

Claims for care may not be allowed except upon clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected. See 43 CFR 4.250(d).

Other than the uncorroborated testimony of the appellant and his wife that decedent orally agreed to compensate the appellant, the record is devoid of evidence establishing the existence of such an agreement. A letter dated April 3, 1973, (subsequent to the date of the alleged oral agreement) addressed to Wallace Dunker, Field Solicitor, Aberdeen, South Dakota, from the decedent, contradicts appellant's claim that he would be compensated for the services rendered:

The foregoing is only an opinion related to me by Mr. Dick Bergen, a retired Civil Service employee and, with his wife, are friends of mine who so kindly volunteered to assist me without remuneration to bring about a settlement in matters pertaining to the trust estate left to me by my late son, Luther Pretty Bird.

Appellant asserts the decedent entered into the oral agreement with him in the presence of Jennie Cloud and Frances Halligan.

Jennie Cloud testified at a hearing held on October 23, 1974, that the decedent did not enter into such an agreement in her presence.

Francis Halligan testified at the same hearing that:

\* \* \* Mr. Bergen has exerted time and effort in carrying through land sales and putting money into this account, but I am sure that he has indicated to me on more than one occasion that he didn't expect reimbursement for it \* \* \*.

We find the preponderance of the evidence in the record does not support appellant's allegation of an oral agreement.

At hearings held by Judge Lambrecht on October 23, 1974, and May 22, 1975, opportunity was afforded the appellant to itemize time and effort he expended on behalf of the decedent and an hourly value for such time. However, appellant chose not to submit same. We find no merit to the "Indian Custom" claim theory raised for the first time in this appeal. We conclude appellant's claim should be denied.

NOW, THEREFORE, by virtue of the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Orders Approving Will and Decree of Distribution dated April 4, 1975, and May 21, 1976, are AFFIRMED, and the appeal is hereby DISMISSED.

This decision is final for the Department.

Done at Arlington, Virginia.

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Mitchell J. Sabagh  
Administrative Judge

I concur:

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Wm. Philip Horton  
Administrative Judge